No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC. *et al.*,

Petitioner,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND *et al.*,

Respondents.

On Writ of Certiorari
to the Court of Appeal of the State of California,
First Appellate District

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

SUPPLEMENTAL BRIEF FOR RESPONDENTS 1

CONCLUSION 2

APPENDIX A: State court class actions asserting claims under the 1933 Act prior to the enactment of the Reform Act 1a

APPENDIX B: Cases in which defendants sought to remove matters from state to federal court in the relevant time period 5a

SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents respectfully submit this Supplemental Brief to respond directly to three new assertions in the Petitioners' Reply Brief.

At page 18, petitioners refer to a purported "dramatic increase in class-action filings in California" under the Securities Act of 1933. That is inaccurate. Petitioners are relying on an isolated uptick in the number of suits filed in 2016. "In the first half of 2017, there were four [such] cases brought in California state courts, distinctly fewer than observed in either the first or second halves of 2016." Cornerstone Research, *Securities Class Actions Filings – 2017 Midyear Assessment* at 4 (2017). The annual average for such filings from 2010-2016 was six. *Id.*

At page 22, petitioners attempt to deny the existence of "*any* 1933 Act class action filed in state court until the Reform Act was passed, when—as [respondents] acknowledge, Resp. Br. 28—such cases suddenly emerged." That is doubly inaccurate. Appendix A to this Supplemental Brief includes a sampling of the state court class actions asserting claims under the 1933 Act prior to the enactment of the Reform Act. Further, our opening brief made exactly the opposite point from the one petitioners represent: "In contrast with the uptick in *state law* securities fraud filings after the PSLRA, petitioners have not presented any comparable evidence that the enactment of the [Reform Act] spurred more [1933 Act] securities class actions in state court." Resp. Br. 28 (emphasis added).

At page 24 n.5, petitioners attempt to suggest that they did not seek to remove this case from state to

federal court out of a fear of being sanctioned. That cannot be accurate. Appendix B to this Supplemental Brief includes a sampling of the many cases in which defendants sought to remove such matters from state to federal court in the relevant time period. The one isolated example petitioners cite in their brief involved a single specific defendant that repeatedly sought to engage in futile removals.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted.

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APPENDIX A

Steigman v. Beery, 203 A.2d 463, 468 (Del. Ch. 1964) (declining to dismiss hybrid state court class action asserting state law claims and a claim under the Securities Act of 1933 with prejudice on the basis of the stipulation of settlement);

Jennings v. Roberts Scott & Co., 546 P.2d 343, 345 (Ariz. 1976) (reversing and remanding dismissal of hybrid state court class action asserting claims under the Securities Act of 1933 and the Arizona Securities Act);

Lurie v. Canadian Javelin Ltd., 443 N.E.2d 592, 593 (Ill. 1982), *abrogated by Brundidge v. Glendale Fed. Bank, F.S.B.*, 659 N.E.2d 909 (Ill. 1995) (remand for reconsideration of attorney fees award in hybrid state court class action asserting common law fraud, violation the Illinois Securities Law of 1953, and violations of sections 5 and 17(a) of the Securities Act of 1933);

Drexel Burnham Lambert, Inc. v. Merchants Inv. Counseling, Inc., 451 N.E.2d 346 (Ind. Ct. App. 1983) (affirming denial of motion to dismiss hybrid state court class action asserting violations of section 11 of the Securities Act of 1933 and violations of Indiana securities law);

Kurgan v. Boise, Class Action Complaint, Civil No. CA000863, at 33-39 (Cal. Super. Ct., July 12, 1984) (hybrid state court class action asserting claims under section 17 of the Securities Act of 1933, state law fraud claims, and claims for violation of the California Corporations Code);

Norcott v. Haney, Amended Class Action Complaint, Civil No. 125191, at 37-44 (Cal. Super. Ct., May 1, 1986) (hybrid state court class action asserting claims under section 17 of the Securities Act of 1933, state law fraud claims, and claims for violation of the California Corporations Code);

In re Technical Equities Secs. Litig., First Consolidated Amended Class Action Complaint, Master File No. 595215, at 60-75 (Cal. Super. Ct., June 2, 1986) (hybrid state court class action asserting claims under sections 11, 12, 15 and 17 of the Securities Act of 1933 Act, state law fraud claims, breach of fiduciary duty claims, RICO claims, and claims for violation of the California Corporations Code);

Engel v. Elsner, Class Action Complaint, Civil No. CA000991, at 39-44 (Cal. Super. Ct., July 8, 1986) (hybrid state court class action asserting claims under section 17 of the Securities Act of 1933, state law fraud claims, and claims for violation of the California Corporations Code);

Harris v. Union Electric Co., 1988 Mo. App. LEXIS 58 (Mo. App. Ct. 1988) (affirming judgment for plaintiffs in state court class action asserting claims under section 17 of the Securities Act of 1933 and section 323(a) of the Trust Indenture Act of 1939);

Abbey v. Allergan, Inc., Civil No. 602236, Class Action Complaint, at 8-13 (Cal. Super. Ct., Sept. 12, 1989) (hybrid state court class action asserting claims under sections 11 and 15 of the Securities Act of 1933, state law fraud claims, and claims for violation of the California Corporations Code);

Norman v. Paco Pharmaceutical Services, Inc., Civil Action No. 10417, Memorandum Opinion, 1989 Del Ch. LEXIS 131, at *28-*33 (Del. Ch. Sept. 22, 1989) (denying motion to dismiss certain claims in hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law fraud, negligent misrepresentation, breach of fiduciary duty, and breach of contract claims);

Porter v. Texas Commerce Bancshares, Inc., 1989 Del. Ch. LEXIS 130 (Del. Ch. Oct. 12, 1989) (denying motion to dismiss hybrid state court class action asserting claims under Securities Act of 1933 and claims under state corporation code);

Donaldson Lufkin & Jenrette Sec. Corp. v. Star Techs., Inc., 561 N.Y.S.2d 371 (Sup. Ct. 1990), on reargument, 567 N.Y.S.2d 1002 (Sup. Ct. 1991), and aff'd, 580 N.Y.S.2d 657 (1992), and aff'd, 580 N.Y.S.2d 657 (1992) (denying motion for summary judgment of hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933 and common law claims);

In re Union Square Assoc. Sec. Litigation, 1990 Del. Ch. LEXIS 207 (Del. Ch. Dec. 18, 1990) (approving settlement of hybrid state court class action asserting claims under sections 11 and 12 of the Securities Act of 1933 as well as state fraud and negligent misrepresentation claims);

Wyly v. Mazzafo, 1991 Del. LEXIS 307 (Del. 1991) (denying interlocutory appeal from order granting in part and denying in part motion to dismiss hybrid state court class action asserting claims under section 12 of the Securities Act of 1933 and state breach of fiduciary duty claims);

In re USACafes, L.P. Litig., 600 A.2d 43, 46 (Del. Ch. 1991) (denying in part and granting in part motion to dismiss claims in state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law claims involving breach of fiduciary duty);

Mann v. Kemper Fin. Cos., No. 1-90-0282, Opinion, 618 N.E.2d 317, 321-322 (Ill. App. Ct., Dec. 30, 1992) (affirming in part and reversing in part dismissal of complaint for failure to state claim in hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law fraud, breach of fiduciary duty, and accounting claims);

Branson v. Exide Elecs. Corp., No. 457, Opinion, 1994 Del LEXIS 129, at *9-*10 & n.2 (Del. Apr. 25, 1994) (reversing and remanding case to Delaware Chancery Court on dismissal of complaint for failure to state claim in hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law breach of fiduciary duty claims);

Glosser v. Cellcor, Inc., Civil Action No. 12725, Memorandum Opinion, 1995 Del. Ch. LEXIS 16, at *1-*2, *16-*19 (Del. Ch. Mar. 10, 1995) (certifying certain class claims in hybrid state court class action asserting violations of sections 11 and 12 of the Securities Act of 1933, as well as state law fraud and negligent misrepresentation claims).

APPENDIX B

Rajasekaran v. CytRx Corp., No. CV 14-3406-GHK (PJWx), 2014 WL 4330787 (C.D. Cal. Aug. 21, 2014);

Plymouth Cty. Ret. Sys. v. Model N, Inc., No. 14-cv-04516-WHO, 2015 WL 65110 (N.D. Cal. Jan. 5, 2015);

Rosenberg v. Cliffs Nat. Res., Inc., No. 1:14CV1531, 2015 WL 1534033 (N.D. Ohio Mar. 25, 2015);

City of Birmingham Ret. & Relief Sys. v. MetLife, Inc., No. 2:12-CV-2626-SLB, 2015 WL 4385277 (N.D. Ala. Mar. 31, 2015);

Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc., No. SA CV 15-0687-DOC, 2015 WL 3631833 (C.D. Cal. June 10, 2015);

Liu v. Xoom Corp., No. 15-CV-00602-LHK, 2015 WL 3920074 (N.D. Cal. June 25, 2015);

City of Warren Police & Fire Ret. Sys. v. Revance Therapeutics, Inc., 125 F. Supp. 3d 917 (N.D. Cal. 2015);

Schneider v. MobileIron, Inc., No. 3:15-cv-04404-VC, Order granting Motion to Remand (N.D. Cal. Nov. 30, 2015);

Buelow v. Alibaba Grp. Holding Ltd., No. 15-cv-05179-BLF, 2016 WL 234159 (N.D. Cal. Jan. 20, 2016);

Carlson v. Ovascience, Inc., No. 15-14032-WGY, 2016 WL 2650707 (D. Mass. Feb. 23, 2016);

Badri v. Terraform Glob., Inc., No. 15-cv-06323-BLF, 2016 WL 827372 (N.D. Cal. Mar. 3, 2016);

Fraser v. Wuebbels, No. 15-cv-06326-BLF, 2016 WL 827373 (N.D. Cal. Mar. 3, 2016);

Iron Workers Mid-S. Pension Fund v. Terraform Glob., Inc., No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016);

Patel v. Terraform Glob., Inc., No. 16-cv-00073-BLF, 2016 WL 827375 (N.D. Cal. Mar. 3, 2016);

Fortunato v. Akebia Therapeutics, Inc., 183 F. Supp. 3d 326 (D. Mass. 2016);

Elec. Workers Local #357 Pension & Health & Welfare Trs. v. Clovis Oncology, Inc., 185 F. Supp. 3d 1172 (N.D. Cal. 2016);

Carlson v. Ovasci., Inc., 189 F. Supp. 3d 185 (D. Mass. 2016);

Pytel, et al. v. Sunrun Inc., et al., No. C 16-2566-CRB,C, 2016 U.S. Dist. LEXIS 90417 (N.D.Cal. July 12, 2016);

Rivera v. Fitbit, Inc., No. 16-cv-02890-SI, 2016 WL 4013504 (N.D. Cal. July 27, 2016);

Westmoreland Cnty Emp. Ret. Fund v. Inventure Foods Inc., No. CV-16-01410-PHX-SMM (D.Ariz. Aug. 11, 2016);

Public Emp. Ret. Sys. of Miss. v. Sprouts Famers Market Inc., No. CV-16-008115-PHX-ROS (D. Ariz. Mar. 27, 2017);

Nat'l Shopmen Pension Fund v. Ally Fin. Inc., 2017 U.S. Dist. LEXIS 85242 (E.D. Mich. May 26, 2017).